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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO. 1027

ROY D. THOMAS, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI To The UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI To The UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To The Honorable The Chief Justice, and The Associate Justices of The Supreme Court of The United States:

Petitioner ROY D. THOMAS, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above cause on December 19, 1966.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet officially reported. It is printed in the Appendix as Exhibit A. The

District Court did not write an opinion. The judgment of the Court of Appeals is attached as Appendix B. Motion for Rehearing was denied by the United States Court of Appeals on January 6, 1967. Said order is reprinted as Exhibit C in said Appendix.

JURISDICTION

Judgment of the Court of Appeals was entered on December 19, 1966. Rehearing was denied on January 6, 1967. The jurisdiction of this Court is invoked under 28 U.S. Code, Section 1254(1).

QUESTIONS PRESENTED

Questions presented:

1) Are a Grand and Petit Jury properly selected, chosen and constituted when selected substantially through the use of a Texas poll tax list?

2) Did the Trial Court's repeated threats to jail Petitioner's counsel deprive Petitioner of adequate representation of counsel and procedural due process?

3) Did the Courts below err in admitting admissions made by Petitioner to Government Agents while he was under investigation and questioning without the presence of counsel, and without being advised of the right to counsel.

4) Did the Trial Court err in failing to order a presentence investigation or consider granting probation where Petitioner had no prior criminal record?

STATEMENT OF THE CASE

Petitioner was indicted (R. 5) and found guilty on two counts of wilfully and knowingly make and subscribe a false Form 1040, United States Individual Income Tax

Return for the calendar years 1958 and 1959, the said returns understating reported total receipts. He was sentenced to 18 months on Count One and two years on Count Two, the execution of sentence on Count Two suspended, and Petitioner was placed on probation for a period of three years with supervision to run consecutive to the sentence on Count One. (R. 304-305). Although Petitioner had no prior criminal record, no pre-sentence investigation or report was ordered, and he was sentenced immediately after the handing down of the verdict (R. 269).

> "The Court: I believe that I've heard enough, it isn't necessary for me to have a pre-sentence report. Stand up, Mr. Thomas."

At the outset, before the jury voir dire even commenced, the Court repeated the serious threats made in a prior companion trial when Petitioner's counsel approached the bench for a ruling on the remoteness of a prior conviction of a Government witness.

> "The Court: I don't want to aggravate this case and put you in for six months instead of sixty days.
>
> Mr. Schwartz: We are trying to stay away from that completely, not to open the door, and we sure don't want to do it.
>
> The Court: Open the door of the jail, that's what you'll be doing.
>
> Mr. Schwartz: Well, we want to avoid it.
>
> The Court: Not to let you out, but to take you in.
>
> Mr. Schwartz: Your Honor, we want to avoid mention of the House of Tobacco or anything that can suggest Schepps.

The Court: Schepps wasn't ever mentioned; you brought out about as much about the other as they did and made that unfortunate statement. (R. 31-32)."

The transcript and record in the case of *Hooks v. United States*, must be referred to to obtain in full context the seriousness of the Court's threats to counsel, and how they resulted in deprivation of effective assistance of counsel. During the cross-examination of the same special agent, Edgar W. Henley, a week earlier, in the *Hooks* case, the Court's attack upon Petitioner's counsel, even where no objection made a ruling necessary, began, and built to a crescendo.

"The Court: Don't you testify. (R. 382).

. . .

The Court: You have had all night to go over it, haven't you? (Referring to Petitioner's counsel being handed 18 U.S.C. 3500 statements.)

. . .

The Court: Let him finish when he is answering. Don't interrupt and ask him—

Mr. Schwartz: If it please the Court, he was going off unresponsive.

The Court: It doesn't matter. I'm the one that passes on the admissibility, not you. Read him back as far as he has gone. (R. 389).

. . .

The Court: Mr. Schwartz, I don't want you to do that any more.

Mr. Schwartz: Your Honor, I can't tell when he has stopped. I'll just wait.

The Court: Well, I can. (R. 390-391).

. . .

The Clerk: The jury is out of the courtroom, Judge.

Mr. Schwartz: Your Honor, if it please the Court, before going into this matter, I thought that we ought to get a ruling from the Court so that there would be no—I think they're relevant in the purpose of showing prejudice and bias of this witness and if the Court approves, or if not, make a bill on it to go into the following matters. First of all, as to the bias and hostility because of the prior trial which is, has been brought out here through Mrs. Davidson, inadvertently, I don't think the Government particularly invited it, but, nonetheless, the Jurors know there has been another trial of Mr. Hooks.

The Court: Of Mr. Hooks?

Mr. Schwartz: Yes. They know that she has been here before on, in connection with this matter.

The Court: I didn't gather that impression. I thought it had reference to the Schepps case.

Mr. Schwartz: Well, sir, by saying—Mr. Hooks, he was one of the six conspirators tried in the Schepps case.

The Court: Tried where?

Mr. Schwartz: Judge Noels' Court, last April and May, and, of course, by doing it this way, Your Honor, I'm losing the impact of this—

The Court: You're probably bringing it in at your own peril or his peril, because I don't think they have that information before them now. If you want to go into it, why, it is a danger that you are taking and the same way with, you brought out much more with reference to the House of Tobacco than had been brought in inadvertently by the Government up to date.

Mr. Schwartz: Your Honor, I have gone on the theory that since they know, they have been told something about it they have got to be told enough to not; I have not gone into the amount of purchases and don't intend to and that wasn't raised on direct examination, anyway, but I realize the witness is here listening to this and, of course, can have time to plan things, but I do want to go in and show that because of certain things in that case and *the results thereof*— (emphasis added).

The Court: What is your idea as to that?

Mr. Susman: We don't object. He's not biased and if counsel wants to explore that, we have no objection.

The Court: All right.

Mr. Schwartz: I just wanted the Court to know before I go into it.

Mr. Susman: We might object to the phrasing of the question.

The Court: Be careful on this breaking in, because that is something I don't tolerate. I have nearly put several lawyers in jail for six months for that sort of procedure. I don't let either side or anybody do that. That's one of the things I'm very sensitive about.

Mr. Schwartz: Your Honor, I was attempting in one instance, the witness was clearly unresponsive—

The Court: I know, but I don't let Mr. Percy Foreman or anyone else do that, and they have tried it and they had to abandon it. You'd better do it, too.

Mr. Schwartz: Your Honor, it's a habit I have had—

The Court: Maybe if you spend six months in jail, you will abolish that habit.

Mr. Schwartz: Probably would.

The Court: We'll put it to a test.

Mr. Schwartz: Your Honor, I'm going the other way, now, wait thirty seconds after he finishes, slows it down a bit, but if he is going to pause as long as—

The Court: I believe it's to your advantage, probably." (R. 401-404).

Thus, the matters were presented out of the Jury's presence for the Court to hear prior to putting them on before the jury.

In open court the following occurred:

"Q. (By Mr. Schwartz): Mr. Henley, you didn't particularly like it that Mr. Hooks had a lawyer, hired me or a lawyer to represent him in July of '61 after you were questioning him at his house in May of '61, did you?

A. That's—no, sir, that's not right.

Q. That is not true?

A. No, sir.

Q. You haven't made complaints to your boss, as it were, and the United States Attorney, about why is he entitled to have a lawyer?

A. The complaint, if that be the word that is proper because of Attorneys representing both clients, the principal under investigation and the witnesses, when the witnesses whose livelihood may be dependent upon the person involved, or person under investigation, that concerns the attorneys, not Mr. Hooks.

In fact, I have sympathy for him right now for that very purpose, because when I went to see Mr. Hooks, he was to be a witness only. I knew nothing about his tax returns. Okay?

Mr. Schwartz: Your Honor, may it please the Court, I was afraid to ask without him finishing.

The Court: Suppose you just raise your hand when you are finished and Mr. Schwartz will be in the clear.

Q. (By Mr. Schwartz) You never once suggested to any of your superiors that they come before his Honor or one of the other Judges here as you have done in this instance when I was in the District Attorney's office to try and disqualify me as representing him, did you?

A. No, you are an officer of the Court, sir, and I assume you have a card to practice before the Treasury Department and I have no reason to disqualify you or try to.

The Court: Go ahead.

Q. (By Mr. Schwartz) Didn't give the signal, Your Honor, that's why—

The Court: Wait till he does."

. . .

"Q. Now, bringing things up to current more, you weren't at all happy with the results of the jury trial here last April and May, were you, where not a single person was close to being convicted that you tried to prosecute out of this case?

A. Well, I don't prosecute anybody, sir."

. . .

Q. (By Mr. Schwartz) Going back to my original question, Mr. Henley, you were frankly mad when twelve jurors last April and last May, after hearing testimony for thirty days, at least nine out of the twelve wanted to turn Mr. Hooks a-loose?

A. No, I wasn't mad at all.

Q. All right, and you were not mad at me at all, you have no dislike for me?

A. Well, I can take you or leave you, Counselor,

Mr. Schwartz: Your Honor—I wish I could reply likewise— . . .

Then again later, the Court for the first time on his own, and without any urging by the Government, began the following colloquy:

The Court: I'm not sure yet to whether I am going to put you in jail about what happened as to how the other jury stood. You know that was improper.

Mr. Schwartz: I thought I asked the Court in advance about that.

The Court: You made that statement without any question.

I'm very concerned about it. I will brief it but I'm inclined to think that that was a very intentional act and one that merits a jail sentence and if I so desired, after I look into the law, why, that is what is going to happen.

Mr. Schwartz: If it please the Court, I apologize, your Honor. I thought I had asked the Court in advance about that line of questioning.

The Court: Why, certainly, I wouldn't have let you say something like that. That is preposterous and you know that, too.

Mr. Schwartz: I think it is relevant.

The Court: You can test that out in the face of the appellate case. When the case is over, I will put you in jail for sixty days.

Mr. Schwartz: I again, Your Honor, apologize to the Court. You know, I have practiced before your Honor for twelve years in trying to represent the clients and the Court, as well as the oath we are under—

The Court: The Court doesn't want you to represent him.

Mr. Schwartz: I mean with fidelity to the Court, I don't owe the Government any duties in this case, but I do owe my client and the Court and that is why I had these matters out of the presence of the jury to avoid anything being done—

The Court: That other was not out of the presence of the jury.

Mr. Schwartz: I thought as a preliminary matter, it was beforehand—

The Court: Well, that was highly improper.

Mr. Schwartz: Your Honor, I apologize.

The Court: No excuse for it in the world.

Mr. Schwartz: I apologize for it, and if the Court thinks an instruction to the jury as to how they stood—

The Court: No, that would just emphasize at this time, I think. The damage has been done and I think deliberately on your part. I will never be convinced of anything else. Go ahead with your bill.

Mr. Schwartz: If it please the Court, I perhaps didn't make it clear enough, thinking it over after this occurring, my apologies to the Court for this action, if it could be undone, of course, I would do it, Your Honor. That was my whole purpose in any defense before Your Honor or other Judge, state or Federal is not to bring matters out until the Court can rule on them even though a Defendant, of course, a lot of Defendants' attorneys don't do it, I have always done it but for two reasons, if I'm correct then, I have at least a tacit ruling that it is admissible. If it's not, I have made my bill and done my duty to my client. I, of course, probably could never get your Honor to think otherwise than what you have said, that it was deliberate and intentional and willful—

The Court: I used the word "knowingly," I think.

Mr. Schwartz: Improper as the Court has—

The Court: And certainly all of those.

Mr. Schwartz: But, Your Honor, if the Court doesn't desire me to continue on in this case or in the

Thomas case next week, I don't want my client prejudiced at all in the mind—

The Court: Well, if I put you in jail, it won't be until after the other case (Thomas) is tried.

Mr. Schwartz: Well, Your Honor, if there is anything the Court desires to do to the jury or otherwise, Your Honor, If I can do it, I would.

The Court: Well, I told you before, I thought it would only emphasize your error if I mentioned it to them, it will be just underscoring.

Mr. Schwartz: That perhaps would be right. As your Honor knows, in this case, I have attempted to be consistent with representing the client and I think for the best interests of the client that I stipulated to a great many witnesses because I think their testimony would have been, alive, it would have been more damaging to the client.

I have practiced before Your Honor off and on for twelve years and I just would not have done anything, I thought I have always conducted myself—I didn't do it in the heat of a trial, and, naturally, I like to fight for my client's rights.

The Court: No one would do other than compliment you for that.

Mr. Schwartz: No, Your Honor has never discouraged that—

The Court: I know, but I don't want you to fight unfairly.

Mr. Schwartz: Of course, you're the referee of the fight, Your Honor.

The Court: That's right, and I have ruled on that, and I will have the Court Reporter give me the exact statement over again and I will check it against the law and if I don't change my mind, I'm going to hold you in contempt and sentence you to a jail sentence.

Mr. Schwartz: Well, Your Honor—

The Court: Anything you want to say, Mr. Susman?

Mr. Susman: Didn't have anything to say, Your Honor.

The Court: 1; 45, gentlemen.

Mr. Schwartz: Very well.

. . .

Page 12, Line 14, through Page 14, Line 19, the end, of Supplemental Transcript:

The Court: Well, there is a feature or two of the case that I want to think about a little longer and it won't be necessary for the witnesses to come back, but Mr. Schwartz and Mr. Hooks and the wife, I'll take it up the first case next Friday, at 9:30.

The Clerk: Please be back in this courtroom Friday, February the 4th, 1966, at 9:30, No. 1 case.

Mr. Susman: It's agreeable—?

The Court: Oh, yes.

Mr. Schwartz: Thank you, Your Honor. Your Honor, I'm due that afternoon in Judge Spears' court. I'm sure that I'll be out of here in time to catch a noon plane.

The Court: Well, maybe not, I have another matter with you that is undisposed of.

Mr. Schwartz: Well, Judge Spears has set it for two o'clock.

The Court: All right, I'll skip it for two weeks, then.

Mr. Schwartz: Thank you.

The Clerk: Please be back in this courtroom Fe-

bruary the 11th, 1966 at 9:30 A.M., number one case.

Mr. Schwartz: Thank you, your Honor.

. . .

". . . and the matter concerning you, Mr. Schwartz, I haven't yet had an opportunity to discuss it with all of the parties at one time and I will let you know what the situation is after I do.

5) Thomas F. Burr, a Federal Jury Commissioner for "10 or 12 years", testified with respect to the Grand and Petit Jury selection that, "We have a poll tax list here in the District Clerk's Office and I go there periodically and select some names. And then, Mrs. Lowrey, I think, selects some names from that same list." (R. 7 of transcript of proceedings of United States of America v. Joseph P. Lucia, et al, and made a part of this record by stipulation of counsel).

"Q. But ascribing it as best you can approximate it, Mr. Burr, you have the poll tax list from Harris County and does not at least 90% of the jurors, are not at least 90% of the jurors that are selected from Harris County picked from the poll tax list during the times that we were concerned with?

A. I see a good majority of them are picked from that list. Whether 90% would be correct, I do not know, but I think a majority of them come from the poll tax list.

Q. Well, sir, do you recall you and I discussing this the other day on the telephone about the matter and did you estimate for me then 90% or more realizing you didn't keep any exact figures on it.

A. I did say that, but on second thought I don't know whether it is—90% is quite a heavy majority, and I don't believe it is quite that." (Lucia stipulated testimony, supra, pages 10-11.)

Since Harris County comprises 85% of the total population based on the 1960 census of all the counties comprising the Houston Division, "I expect about that percentage" of the total was selected from Harris County, and each County its approximate percentage. (Lucia stipulated testimony, page 9.)

He selected names without either the Deputy or the Clerk being present, and they did likewise. The names were turned in to Mrs. Lowrey, Deputy Clerk, and she checks them to see if they had served on a previous jury and "they kinda screen them and see if they are all right." (Lucia stipulated testimony, pp. 10, 11.)

The poll tax lists contained the name, occupation, age, and where a prospective juror was born, and how long he had been in the County. "I take all that into consideration." (Lucia, page 11). Mr. V. Bailey Thomas, the District Clerk did not know the source of the remaining 15% of the jurors furnished from adjacent counties.

The Commissioners did not use the new registration list of persons eligible to vote in Federal elections without having a poll tax. (Lucia testimony, supra, pp. 23, 24).

The District Court refused tendered voir dire questions relating to the petit jury panel having a poll tax. (R. 25).

REASONS FOR GRANTING THE WRIT

1) The Court of Appeals' decision in this case is in conflict with the rationale of this Court's recent decisions in *Harper, Et Al v. Virginia, Et Al,* 383 U.S. 663, and *United States of America v. The State of Texas, Et Al,* __U.S.__, affirming 252 F.Supp. 234, 1966. Those decisions, holding that the poll tax cannot be made a prerequisite to voting because it would be an encroachment on a fundamental right, apply equally, if not with greater force to its use

in denying petitioner the right to a fair, impartial and representative jury. Wealth or fee paying equally have no view to a juror's qualifications than they do to a voters. An impartial jury is a constitutionally required mandate of the Sixth Amendment[1] to the United States Constitution.

II.

The Court of Appeals' decision in this case held Petitioner's point that he was denied effective assistance of counsel because of the Trial Court's repeated threats to his counsel to be without merit. In so doing it is contrary to the rationale of the decision of the Court of Appeals in *Malaga v. United States*, 57 F.2d 822 (1st Cir. 1932), this Court's observations in *Quercia v. U. S.*, 289 U.S. 466, that a Defendant should be free from hostile comment and with that provision of the Sixth Amendment entitling an accused to have the effective assistance of counsel for his defense.

III.

The Court of Appeals' decision in this case held to be without merit petitioners contention that he had the right to a pre-sentence investigation and the consideration of possible probation. This is in conflict with the decisions in *United States v. Wiley*, 267 F.2d 453, (7th Cir., 1959) and same case at 278 F.2d 500 (7 Cir. 1960). The District Court's failure to order or even consider a pre-sentence investigation and report a probation is also in conflict with this Court's decision in *Burns v. United States*, 287 U.S. 216,

1. In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law and to be informed of the nature of the case against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense."

220, 223, which held that "while probation is a matter of grace, the probationer is entitled to fair treatment and is not to be made the victim of whim or caprice," and dictum in this Court's decision in *Williams v. People of the State of New York*, 337 U.S. 231, 277 (1949), wherein this Court said:

> "The knowledge of the life of a man, his background and his family, is the only proper basis for the determination as to his treatment. There is no substitute for information. The sentencing judge in the Federal Court has the tools with which to acquire that information. Failure to make full use of those tools cannot be justified."

In the latter *Wiley* decision, *supra*, 278 F.2d 500 (7th Cir. 1960) the Court of Appeals twice remanded the case to the District Court with instructions that it perform the functions imposed upon it under the Probation Act, i.e. order and receive and consider a probation report. The Court of Appeals here sanctioned the District Court's failure to make use of the tools available to him.

IV.

The Court of Appeals' decision in this case held that admitting into evidence admissions by Petitioner to Government Agents when he was under investigation and questioned without the presence of counsel and without being advised of the right to counsel was proper. And any specification of error predicated thereon was without merit. The Special Agent and his accompanying Revenue Agent admittedly gave Petitioner no warning at all as to his rights to have an attorney from the very first meeting on November 4, 1960 (R. 91, 94, 95). Even though Petitioner "preferred to have legal advice before making any kind of

statement" (R. 93) Petitioner thereupon was required to verify his signature on the tax returns which was the proof of that essential element of the offense against him (R. 101-1). In approving this, the Courts below conflicted with this Court's rulings in *Escobedo v. Illinois*, 372 U.S. 335, and *Miranda v. Arizona*, 384 U.S. 436, 1966. Without these admissions only the vague recollection of Government witnesses Hall would have remained (R. 74):

> "But just to be able to swear that he did, now, you would have to have a memory like an elephant . . ."
> "Well, that something I don't believe anybody could remember that." (R. 75).

CONCLUSION

For the foregoing reasons this Petition for Writ of Certiorari should be granted. This case merits reversal and remand for a new trial, or dismissal because of the improper selection of the Grand Jury returning the indictment against petitioner.

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EXHIBIT A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 23,462

ROY THOMAS, Appellant,

versus

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the Southern District of Texas.

(December 19, 1966.)

Before TUTTLE, Chief Judge, and AINSWORTH and DYER, Circuit Judges.

PER CURIAM: Appellant was convicted of willfully making false statements on his income tax returns for the years 1958 and 1959 in violation of 26 USCA §7206 (1). Of the many specifications of error relied upon the only one that need be noted is the contention that the indictment should have been dismissed because the grand jury pool from which this particular grand jury was selected was compiled substantially from the Texas poll tax list. There was a complete lack of evidence that the grand jury pool used here did not reflect a fair cross-section of the community. See *Rabinowitz v. United States*, 5 Cir. 1966, 366 F.2d 34.

We have considered all the specifications of error and find them to be without merit. The judgment is

AFFIRMED.

EXHIBIT B

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1966

No. 23,462

D. C. Docket No. 65-H-177-Criminal

ROY THOMAS, Appellant,
versus
UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the Southern District of Texas

Before TUTTLE, Chief Judge, AINSWORTH and DYER, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

December 19, 1966

Issued as Mandate:

EXHIBIT C

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 23,462

ROY THOMAS, Appellant,

versus

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the Southern District of Texas

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Before TUTTLE, Chief Judge, AINSWORTH and DYER, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of appellant for permission to file a typewritten petition for rehearing in the above entitled and numbered cause is hereby granted and petition for rehearing is hereby denied.

(ORIGINAL FILED—JANUARY 6, 1967).

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1027

ROY D. THOMAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 18) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 1966. A petition for rehearing was denied on January 6, 1967. The petition for a writ of certiorari was filed on February 3, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the grand jury was improperly constituted.

248-573—67

2. Whether the trial judge's warning, delivered out of the presence of the jury, that he would jail petitioner's counsel if he repeated the misconduct which had occurred in a prior related case resulted in a denial of effective representation.

3. Whether it was error to receive evidence of petitioner's admission to an I.R.S. agent investigating his income tax returns that the signature on the returns was his.

4. Whether the trial judge erred in failing to order a presentence report.

STATEMENT

After a trial by jury in the United States District Court for the Southern District of Texas, petitioner was convicted on two counts charging that he wilfully made false income tax returns for the years 1958 and 1959 by understating his gross receipts. 26 U.S.C. 7206(1). On January 26, 1966, petitioner was sentenced to eighteen months' imprisonment on Count 1, to be followed by a three-year period of probation, and to a two-year suspended term of imprisonment on Count 2. (R. 288–289, 305).

The evidence, which is not in issue, showed that petitioner, a jobber primarily in the business of selling cigarettes wholesale (R. 55, 180), sold large quantities of cigarettes for which he failed to keep invoice records. He paid his suppliers by signing over to them the checks which he received from his purchasers, thus making discovery of the unreported sales transactions less likely. In addition, he did not inform the man who prepared his income tax returns of the sales

(R. 53–56, 67, 104–119, 124–125). The sums by which his gross receipts were understated on his returns for the years 1958 and 1959 were approximately $175,000 and $166,000 respectively (R. 121–122).

ARGUMENT

1. There is no merit to petitioner's contention that the grand and petit juries were improperly constituted because selected primarily from the Texas poll-tax registration lists.[1] The fact that the Texas poll tax has been held unconstitutional, *United States* v. *Texas*, 252 F. Supp. 234 (W.D. Tex.), affirmed *per curiam*, 384 U.S. 155, does not preclude the use of the tax registration lists as a source from which federal grand and petit juries may be chosen. The court in *United States* v. *Texas, supra*, did not find that the poll tax discriminated against any identifiable group or class. Indeed, it specifically found that Negroes were not discriminated against. 252 F. Supp. at 245–246. The court struck down the law solely on the ground that the right to vote could not be conditioned upon the payment of even the minimal sum ($1.50) required by Texas' poll tax statute. 252 F. Supp. at 254–255.

In the present case, as the court of appeals held, petitioner failed to meet the burden prescribed by *Swain* v. *Alabama*, 380 U.S. 202, 205, of showing that "the grand jury pool used here did not reflect a fair

[1] It should be noted that while petitioner includes the petit jury in his attack (Pet. 2), he failed to raise any challenge to such panel in the trial court. The court of appeals thus considered only the constitution of the grand jury to be in issue before it (Pet. 18).

cross-section of the community" (Pet. 18).[2] See also *United States* v. *Bowe*, 360 F. 2d 1, 7 (C.A. 2). The use of voter registration lists as the *exclusive* source of a poll of grand and petit jurymen has been sustained. *Gorin* v. *United States*, 313 F. 2d 641, 644 (C.A. 1), certiorari denied, 374 U.S. 829. Here, as the record reveals, the lists were supplemented by names obtained from several other sources, such as newspaper articles, the city directory, the telephone book, and lists of members of various organizations. Supp. R. 6–7.[3] See *United States* v. *Van Allen*, 208 F. Supp. 331, 333 (S.D.N.Y.), affirmed in part, reversed in part on other grounds *sub nom. United States* v. *Kelly*, 349 F. 2d 720, 778–779 (C.A. 2), certiorari denied, 384 U.S. 947. In these circumstances, petitioner's assertion that the grand and petit juries were improperly constituted is without factual support.

2. Prior to the trial of the instant case, petitioner's counsel, Mr. Schwartz, had represented one Hooks in

[2] The test adopted by the Fifth Circuit is a unique one. See *Rabinowitz* v. *United States*, 366 F. 2d 34 (C.A. 5). Other circuits adhere to the more rigorous standard, consistently applied by this Court (*e.g.*, *Smith* v. *Texas*, 311 U.S. 128; *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 220; *Swain* v. *Alabama*, 380 U.S. 202), that before a jury will be held unlawfully constituted, there must have been a purposeful exclusion of a cognizable group or class. *E.g.*, *United States* v. *Kelly*, 349 F. 2d 720, 778–779 (C.A. 2), certiorari denied, 384 U.S. 947; *Gorin* v. *United States*, 313 F. 2d 641, 644 (C.A. 1), certiorari denied, 374 U.S. 829; *United States* v. *Henderson*, 298 F. 2d 522, 525–526 (C.A. 7), certiorari denied, 369 U.S. 878.

[3] "Supp. R." refers to the testimony of federal jury commissioners Burr and Thomas in a case entitled *United States* v. *Lucia*, made part of the record below by stipulation (R. 420–421). We are lodging a copy of the transcript of their testimony with the clerk of this Court.

a related prosecution involving Hooks' alleged wilful failure to report on his income tax return receipts from sales of tobacco. In his cross-examination of a government witness at that trial, Mr. Schwartz referred to the fact that at a previous trial of Hooks "at least nine out of the twelve [jurors] wanted to turn Mr. Hooks aloose" (R. 411). The trial judge believed that the statement had been deliberately made to prejudice the jury, and he indicated that when the case was over, he might hold Mr. Schwartz in contempt and sentence him to jail for sixty days (Pet. 9–11).

Several days later, at the outset of the present trial, Mr. Schwartz approached the bench and requested the court (the same judge who had presided at the *Hooks* trial) to ask the prospective jurors whether they had read anything in the newspapers concerning either the *Hooks* case or this one. After some colloquy, the following exchange occurred (R. 31–32):

> The COURT. It [the paper] didn't have very much, the headline was, the first part mentioned the *Schepps* case,[4] be sure that you don't—I don't want to aggravate this case and put you in for six months instead of sixty days.
>
> Mr. SCHWARTZ. We're trying to stay away from that completely, not to open the door, and we sure don't want to do it.
>
> The COURT. Open the door of the jail, that's what you'll be doing.
>
> Mr. SCHWARTZ. Well, we want to avoid it.

[4] The case referred to was a related prosecution involving one Schepps who was the president of a company called the House of Tobacco, petitioner's largest supplier of cigarettes (R. 151).

> The COURT. Not to let you out, but to take you in.
>
> Mr. SCHWARTZ. Your Honor, we want to avoid mention of the House of Tobacco or anything that can suggest Schepps.
>
> The COURT. Schepps wasn't ever mentioned; you brought out about as much about the other as they did and made that unfortunate statement.

Petitioner contends that the court's "threats" deprived him of the effective assistance of counsel at his trial (Pet. 4). The contention is without merit. A reading of the record discloses that Mr. Schwartz conducted a vigorous defense and was not restricted in the presentation of his case or in the cross-examination of witnesses. The court's remarks occurred out of the presence of the jury and were never thereafter repeated or referred to.

3. Petitioner claims that the court erred in admitting testimony of I.R.S. agent Henley that, on being asked, petitioner identified his signature on his income tax returns for 1958 and 1959 (Pet. 16–17). Petitioner, who was not then in custody, was informed that his returns were under examination (R. 100). The present claim that the admission regarding the signature was inadmissible rests on the fact that petitioner was not first advised of the right to consult counsel (R. 101). The record shows that there was no custodial interrogation and that petitioner was aware of all his rights.[5] Internal Revenue agents are under no con-

[5] A little more than a year before, the same agent had asked petitioner if he would make a statement in connection with certain transactions he had had with other persons whose tax re-

stitutional obligation to advise taxpayers not in custody that they may consult counsel. See *Kohatsu* v. *United States*, 351 F. 2d 898 (C.A. 9), certiorari denied, 384 U.S. 1011. In addition, this case was tried on January 24, 1966, prior to the date on which the rules of *Miranda* v. *Arizona*, 384 U.S. 436, have been held applicable. *Johnson* v. *New Jersey*, 384 U.S. 719.

4. Petitioner argues that the court erred in failing to order a presentence investigation and report as authorized by Fed. R. Crim. P. 32(c) (Pet. 15–16). The records reveals, however, that before pronouncing sentence the court heard evidence from petitioner's wife regarding their family situation, amount of property, and her ability to support their children (R. 272–282). The court also questioned petitioner as to certain facts brought out at trial (R. 282–285). In these circumstances, the failure to call for a presentence investigation was not an abuse of discretion. *United States* v. *Tenenbaum*, 327 F. 2d 210 (C.A. 7), certiorari denied, 377 U.S. 905; *United States* v. *Visconti*, 261 F. 2d 215 (C.A. 2), certiorari denied, 359 U.S. 954.

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turns were under examination. Petitioner declined, saying that he preferred to get legal advice before making any kind of statement (R. 93–94). A few days later, petitioner was summoned by the agent to give an affidavit. He first appeared without a lawyer but left to get one. Upon his return with counsel, he gave the affidavit (R. 97–98).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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